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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**DA**  
ADMINISTRATIVE APPEALS OFFICE  
CIS-440 20 MASS. 3/F  
425 Eye Street N.W.  
Washington, D.C. 20536

**FEB 02 2004**

File: LIN 02 077 50693

Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

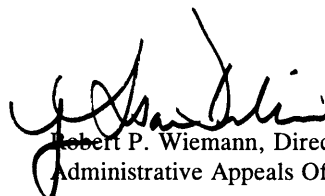
**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director of the Nebraska Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director to treat the appeal as a motion.

The petitioner is involved in the development and marketing of computer software in the pharmaceutical, biotechnology, chemical, and agrochemical industries. It seeks to employ the beneficiary as a computer software consultant. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to submit evidence of a properly certified Labor Condition Application (LCA).

An affected party has 30 days from the date of an adverse decision to file an appeal. 8 C.F.R. § 103.3(a)(2)(i). If the adverse decision was served by mail, an additional three days is added to the proscribed period. 8 C.F.R. § 103.5 (a)(b). The record reflects that the director sent his decision of August 26, 2002, to the petitioner at its address of record. The appeal was received by Citizenship and Immigration Services (CIS) 35 days later on September 30, 2002. Therefore, the appeal was untimely filed.

An appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). If, however, an untimely appeal meets the requirements of a motion to reopen or reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5 (a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5 (a)(3).

In denying the I-129 petition, the director noted that certified LCAs were submitted covering different job titles than the title of the proffered position noted on the I-129 petition. On appeal, counsel states that the duties of the offered position are covered by the certified LCAs submitted prior to the director's decision, even though the job titles on the LCAs are different than the title of the position noted on the Form I-129. Counsel also submits a new LCA for the position, Software Consultant, dated September 13, 2002.

The evidence submitted by the petitioner satisfies the requirements of a motion. Therefore, the petition will be remanded to the director to treat the appeal as a motion. The director may request any additional evidence deemed necessary to assist him with the determination.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The petition is remanded to the director for entry of a new decision.